

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DEFENDERS OF WILDLIFE,  
*et al.*,

Plaintiffs,

v.

SUSAN MARTIN, *et al.*,

Defendants

v.

IDAHO STATE SNOWMOBILE  
ASSOCIATION, *et al.*,

Defendant-Intervenor-Cross  
Claimants.

NO. CV-05-248-RHW

**ORDER DENYING PLAINTIFFS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT,  
GRANTING DEFENDANTS'  
CROSS-MOTION AND  
PLAINTIFFS' MOTION FOR  
INJUNCTIVE RELIEF**

Before the Court are Plaintiffs' Motion for Partial Summary Judgment (Ct. Rec. 36), Defendants' Cross-Motion for Partial Summary Judgment (Ct. Rec. 78), and Plaintiffs' Second Motion for Injunctive Relief (Ct. Rec. 105). A hearing was held on September 7, 2006, in Spokane, Washington. Lauren Rule, Michael Leahy, and Richard Eichstaedt appeared on behalf of Plaintiffs; Jimmy Rodriguez appeared on behalf of Defendants; and Paul Turcke and Mark Ellingsen appeared on behalf of Defendant-Intervenors.

**BACKGROUND**

In their Complaint, Plaintiffs challenge two biological opinions issued by Defendants Martin and the U.S. Fish and Wildlife Service ("FWS" or "Service"),

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT, GRANTING DEFENDANTS' CROSS-MOTION AND  
PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF \* 1

1 and actions by Defendants McNair and U.S. Forest Service (“USFS”), in violation  
2 of the Endangered Species Act of 1973 (“ESA”), 16 U.S.C. §§ 1531 *et seq.* The  
3 Complaint alleges Defendants are allowing the decline of the remaining woodland  
4 caribou in the continental United States by implementing National Forest  
5 Management actions on the Colville and Idaho Panhandle National Forests  
6 (“IPNF”).

7 The Court granted Plaintiffs’ First Motion for Preliminary Injunction by  
8 Order on December 20, 2005 (Ct. Rec. 65). Plaintiffs’ motion was narrow in  
9 scope, asking for an order enjoining Federal Defendants from implementing their  
10 Challenge Cost Share Agreement (“CCSA”) for snowmobile trail grooming in  
11 certain areas of the Idaho Panhandle National Forest during the winter of 2005-  
12 2006. The Court granted Plaintiffs’ motion, finding that the CCSA was an agency  
13 action under § 7(a)(2) of the ESA which required consultation with the Fish and  
14 Wildlife Service before implementation.

15 Plaintiffs’ second motion for injunctive relief asks the Court to issue an  
16 injunction to prohibit the Federal Defendants from authorizing snowmobiling or  
17 snowmobile trail grooming in the “Caribou Recovery Area” inside the IPNF until it  
18 has adequately *completed* consultation with the Fish and Wildlife Service over the  
19 effects of these activities on woodland caribou. Plaintiffs’ current motion for  
20 partial summary judgment lists four specific issues for the Court’s consideration:

21 (1) The amended [IPNF BiOp] issued by defendants Susan  
22 Martin and U.S. Fish and Wildlife Service is arbitrary, capricious, an  
23 abuse of discretion, and/or contrary to law, pursuant to the ESA and  
24 the Administrative Procedure Act (“APA”);

25 (2) The Incidental Take Statement within the IPNF BiOp is  
26 arbitrary, capricious, an abuse of discretion, and/or contrary to law,  
27 pursuant to the ESA and the APA;

28 (3) Defendants have further violated the ESA by not reinitiating  
consultation over the IPNF BiOp, after the U.S. Forest Service failed  
to comply with the non-discretionary Terms and Conditions within the  
Incidental Take Statement; and/or

(4) Defendants McNair and U.S. Forest Service have violated  
the ESA by failing to consult with U.S. Fish and Wildlife Service over  
their [CCSA] for snowmobile trail grooming on the IPNF, and by

1 failing to ensure that the [CCSA] will not jeopardize the continued  
2 existence of the woodland caribou.

3 (Ct. Rec. 36, Pls.' Mot. Partial Summ. J., at 3). Defendants' cross-motion for  
4 partial summary judgment exactly mirrors Plaintiffs' motion, raising the same  
5 issues for judgment in their favor.

## 6 **FACTS**

7 Defendants and Intervenor submit the Court is limited to reviewing the  
8 administrative record for the pending motions. Plaintiffs assert otherwise because  
9 they are basing their motion for injunctive relief on ongoing violations of the  
10 substantive provisions of §§ 7(a)(2) and 9. As discussed below, the ESA contains  
11 a citizen suit provision that independently authorizes a private right of action to  
12 challenge its violations. 16 U.S.C. § 1540(g)(1). The Court finds Plaintiffs'  
13 motion for injunctive relief is pursuant to this provision and therefore considers all  
14 evidence submitted for review in support of that motion. The following findings  
15 incorporate both the administrative records and the declarations and other evidence  
16 supporting and opposing Plaintiffs' motion for injunctive relief.

### 17 **I. Snowmobiling and its Effects on the Woodland Caribou**

18 The Selkirk Mountains woodland caribou is listed as "endangered" under the  
19 ESA. 50 C.F.R. § 17.11. At the time of listing in the early 1980s, the woodland  
20 caribou's population in the United States was reduced to only 25-30 animals. (Fish  
21 & Wildlife Service Admin. R., at 00019 (hereinafter "FWS AR")). Since 1987,  
22 103 caribou have been transplanted into the region from other populations in  
23 British Columbia to bolster numbers and help stabilize the population. (*Id.*).  
24 Nevertheless, its remaining population numbers only about 35 animals; most of the  
25 population is located in southern British Columbia and a few are found in northern  
26 Idaho and Washington. (*Id.* at 00019). In its 2001 Amended Biological Opinion,  
27 the Service recognized that this population "is considered to be in decline and in  
28 danger of extirpation." (*Id.*). Only a few caribou are likely to be found anywhere

1 south of the Canadian border - - the Idaho Fish and Game Department has found  
2 one to three caribou in several different areas of the Selkirk Mountains during  
3 surveys of northern Idaho over the last five years. (Forest Service Admin. R.  
4 D220, at 2 (hereinafter “USFS AR”)).

5 The late winter habitat of the woodland caribou consists generally of high  
6 elevation areas, where they walk on top of the snow and feed on nutrient-poor  
7 lichen found above the snowline on mature and old-growth trees. (FWS AR, at  
8 00018). There are groomed trails and snowmobile “play areas” throughout the  
9 Selkirk Mountains, including areas close to and in caribou habitat. (*Id.* at 00021).  
10 In its IPNF 2001 Amended Biological Opinion (“BiOp”), the Service states  
11 “[m]uch of the late winter habitat available for caribou is being increasingly  
12 impacted by winter recreational activities (i.e. snowmobile activity). . . . As the  
13 remaining suitable late winter habitat is increasingly infringed upon by winter  
14 recreationists, the potential increases for caribou harassment and possible injury, as  
15 well as displacement from these key habitats.” (*Id.* (citation omitted)).

16 Although no critical habitat has been designated for the population of  
17 woodland caribou, a caribou recovery plan was developed in 1985 and revised in  
18 1994. (*Id.* at 00017). The recovery area outlined in the plan encompasses  
19 approximately 2200 square miles in the Selkirk Mountains of northern Idaho,  
20 northeastern Washington, and southern British Columbia. (*Id.*). About 53 percent  
21 of the recovery area is within the United States, and about 57 percent (175,000  
22 acres) of this area is within the IPNF. (*Id.* at 00017, 00049). As a result of the  
23 1994 revision of the Caribou Recovery Plan, USFS closed a 25-square-mile area of  
24 the IPNF including the Selkirk Crest to snowmobile access to assist in caribou  
25 recovery. (*Id.* at 00057; USFS AR D220, at 2).

26 Approximately 77,000 acres within the caribou recovery area are currently  
27 used by winter recreationists, including snowmobilers. (USFS AR D220, at 2).

1 There are about 50 miles of groomed snowmobile routes mapped and permitted on  
2 national forest lands within the recovery area. (*Id.*). Although the actual area used  
3 by snowmobiles varies depending on snowfall and snow conditions, aerial  
4 monitoring over the past several years has shown an increasing level of use within  
5 areas such as open canopied timbered habitats. (*Id.*). The Forest Service reports  
6 this type of use was rare in the past. (*Id.*). This use appears to directly overlap the  
7 late winter caribou habitat described in the 2001 IPNF Amended BiOp—"mature  
8 and old growth spruce-subalpine fir forests and parkland." (FWS AR, at 00018).

9 One study has recommended that snowmobiling be restricted from high  
10 quality mountain caribou winter habitat or at least limited to a small proportion of  
11 the total high quality habitat for each herd. (Ct. Rec. 107, Rule Decl., Ex. 4, at 24).  
12 Additionally, the Forest Service observed snowmobiling activity that conflicted  
13 with affected caribou in or near the IPNF in the recent past: in an email, a Forest  
14 Service Wildlife Biologist referred to a sighting of two caribou that were  
15 "bumped" out of the Abandon Creek area in March 2004 by snowmobiles in the  
16 area. (*Id.* at 6).

17 Keith Simpson, an expert on woodland caribou and the author of studies  
18 cited by the Forest Service and the FWS, states that "protecting caribou travel  
19 routes between southern areas and northern areas is critical to maintain the genetic  
20 linkage within the population. Small populations are vulnerable to inbreeding and  
21 loss of fitness if members of the population become isolated and cannot  
22 interbreed." (Ct. Rec. 108, 2d Simpson Decl., ¶ 3). Simpson notes that the USFS's  
23 current snowmobile plans allow for snowmobile use that will block movement  
24 between high quality habitat on the Selkirk Crest in Idaho and habitat in Canada.  
25 (*Id.* ¶ 7). He concludes that the measures currently in place "will harm individual  
26 caribou that may be displaced from [ ] habitat; and will not insure the survival of  
27 the population due to the failure to provide for movement between the southern  
28

1 and northern portions of this population's range, cutting off access to prime habitat  
2 and critical genetic linkage.” (*Id.* ¶ 12).

3 Another wildlife and caribou expert, Jon Almack, has documented occasions  
4 when snowmobiling activity has displaced woodland caribou. (Ct. Rec. 109,  
5 Almack Decl., ¶¶ 10-12). He concludes that “[b]y authorizing continued  
6 snowmobile use throughout a large portion of the caribou Recovery Zone, the  
7 Forest Service is injuring caribou that are disturbed by these machines or precluded  
8 from using available habitat, impairing their breeding, feeding, and sheltering  
9 behaviors. This activity is also jeopardizing the continued survival of the entire  
10 South Selkirk mountain caribou population by reducing the reproduction, numbers,  
11 and distribution of the species.” (*Id.* ¶ 44).

## 12 **II. Fish & Wildlife Service's 2001 Amended Biological Opinion**

13 The Service's 2001 Amended BiOp for the IPNF approved the 1987  
14 Panhandle National Forest Plan, concluding the continued implementation of the  
15 Plan “is not likely to jeopardize the continued existence of the Selkirk Mountain  
16 woodland caribou.” (FWS AR, at 00061). Regardless of this determination, the  
17 FWS issued an Incidental Take Statement, which permits limited take “provided  
18 that such taking is in compliance with this Incidental Take Statement.” (*Id.* at  
19 00062). The Incidental Take Statement's terms and conditions for woodland  
20 caribou include a non-discretionary requirement that the USFS by January 2004  
21 “develop and implement a comprehensive recreation strategy which identifies  
22 specific standards and restrictions necessary to protect caribou and their habitat on  
23 the IPNF.” (*Id.* at 00072).

24 USFS has neither developed nor implemented such a strategy. The Service  
25 found a strategy was necessary because

26 [w]inter recreation, particularly snowmobiling, is quickly becoming a  
27 significant threat to caribou, both through direct harassment and  
28 indirectly by potentially precluding caribou use of historic habitats and  
travel corridors. Snowmobile activity continues to rapidly expand

throughout caribou habitat, and the existing standards are not specific enough to clearly address this growing problem. Protection of suitable habitat and travel corridors is essential to ensure that caribou have unrestricted access to available habitat.

(*Id.* at 00057). Assuming USFS had timely developed and implemented a compliant strategy, the Incidental Take Statement still cautions that

the Service is not able to issue a ‘blanket’ incidental take statement with a comprehensive list of reasonable and prudent measures to sufficiently cover all programs and actions subsequently implemented pursuant to the Forest Plan. Individual actions that may result in take of woodland caribou will be subject to future site-specific consultation.

(*Id.* at 00063-64)).

### III. Reinitiation of Consultation

On March 3, 2006, the IPNF formally reinitiated consultation under § 7 of the ESA regarding the effects on woodland caribou of winter recreation activities. (Ct. Rec. 80, McNair Decl., Ex. B). The purpose of the consultation is to consider a comprehensive winter recreation strategy, just as the 2001 Amended BiOp’s Incidental Take Statement dictated. (*Id.*). One of the consequences of the reinitiation of consultation is the 2001 Amended BiOp is no longer considered valid with respect to winter recreation activities. (*Id.*). Accordingly, the provisions of the ESA § 7(d)<sup>1</sup> will apply to winter recreation activities while consultation is

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<sup>1</sup> Section 7(d) of the ESA states:

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d). Section 7(d) was enacted “to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species.” *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024,

1 ongoing. (*Id.*, Exs. A & B). Defendants estimate the consultation process should  
2 take approximately two years to complete. (USFS AR D219).

3 The Forest Service determined it would be in compliance with § 7(d) until  
4 consultation was complete using three criteria: habitat quality, caribou presence,  
5 and proximity of winter recreation activities to the previous two. (USFS AR D220,  
6 at 4). The final § 7(d) determination includes four basic areas of action: (1)  
7 continuing grooming all previously groomed routes except for three areas;<sup>2</sup> (2)  
8 maintaining closures of all existing areas that are currently closed to motorized  
9 winter recreation; (3) implementing a new closure area in the Continental  
10 Mountain-Grass Mountain-Saddle Mountain Area; and (4) continuing  
11 implementation of strategy elements including information and education,  
12 enforcement of existing management direction, monitoring motorized winter  
13 recreation use, and developing a winter recreation strategy. (*Id.* at 6). The Forest  
14 Service maintains this plan will not result in any irreversible or irretrievable  
15 commitment of resources or foreclose any reasonable and prudent alternatives in  
16 regard to caribou on the IPNF. (*Id.* at 7).

#### 17 STANDARD OF REVIEW: INJUNCTIVE RELIEF

18 The usual standard for granting a preliminary injunction “balances the  
19 \_\_\_\_\_  
20 1034-35 (9th Cir. 2005).

21 <sup>2</sup> The three areas where trail grooming is to be discontinued are the  
22 Hemlock Loop outer route, the Smith Creek route on Road 281, and the Pack River  
23 Route. (USFS AR D220, at 5). These areas were found to be located where  
24 caribou have been documented either by telemetry, census, or observations since  
25 the year 2000. (*Id.*). USFS determined that the remaining routes do not provide  
26 ready access for potential predators to travel into high elevation areas where  
27 caribou have been located, and that there is a lack of high quality habitats and a  
28 general absence of caribou from those areas. (*Id.*).

1 plaintiff's likelihood of success against the relative hardship to the parties." *Clear*  
2 *Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).  
3 To obtain a preliminary injunction, Plaintiffs must demonstrate "either (1) a  
4 likelihood of success on the merits and the possibility of irreparable injury; or (2)  
5 that serious questions going to the merits were raised and the balance of hardships  
6 tips sharply in [their] favor . . . ." *Id.* These standards are not separate tests; rather  
7 they are along the same continuum. *Id.* Therefore, the greater the relative hardship  
8 to the party seeking the injunction, the less probability of success must be shown.  
9 *Id.*

10 By enacting the ESA, Congress altered the normal standards for injunctions  
11 under Federal Rule of Civil Procedure 65. The Ninth Circuit has consistently held  
12 that "[t]he traditional preliminary injunction analysis does not apply to injunctions  
13 issued pursuant to the ESA." *Nat'l Wildlife Fed'n v. NMFS*, 422 F.3d 782, 793  
14 (9th Cir. 2005). The Supreme Court stated that in enacting the ESA "Congress has  
15 spoken in the plainest of words, making it abundantly clear that the balance has  
16 been struck in favor of affording endangered species the highest of priorities."  
17 *TVA v. Hill*, 437 U.S. 153, 194 (1978). "Accordingly, courts may not use equity's  
18 scales to strike a different balance." *Nat'l Wildlife Fed'n*, 422 F.3d at 794 (internal  
19 quotation omitted).

20 The standards of review for injunctions under the ESA vary somewhat  
21 according to what type of violation is alleged: procedural or substantive. "The  
22 remedy for a substantial *procedural* violation of the ESA—a violation that is not  
23 technical or *de minimus*—*must* therefore be an injunction of the project pending  
24 compliance with the ESA." *Wash. Toxics Coalition*, 413 F.3d at 1034 (upholding  
25 an injunction prohibiting the EPA from authorizing the use of certain pesticides  
26 within proscribed distances of salmon-bearing waters until it had fulfilled its  
27 consultation obligations under § 7(a)(2) of the ESA) (emphases added).

1 Here, Plaintiffs are alleging a substantive violation of the ESA rather than a  
2 procedural violation. To show they are entitled to a preliminary injunction due to a  
3 substantive violation of the ESA, Plaintiffs must “make a showing that a violation  
4 of the ESA is at least likely in the future.” *Nat’l Wildlife Fed’n v. Burlington*  
5 *N.R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (“*Burlington N.R.R.*”). What is  
6 required is “a definitive threat of future harm to protected species, not mere  
7 speculation.” *Id.* at 1512 n.8. The Ninth Circuit has pointed out that “courts are  
8 not mechanically obligated to grant an injunction for every violation of law[,]”  
9 while at the same time noting that “[p]ast takings are [ ] instructive, especially if  
10 there is evidence that future similar takings are likely.” *Id.* at 1512 (citing *TVA*,  
11 437 U.S. at 173; affirming district court’s finding that future similar takings were  
12 not likely in that case). Plaintiffs urge the Court to take particular care considering  
13 the circumstances of the woodland caribou, emphasizing that temporary harms  
14 during the consultation process could lead to the permanent harm of extinction.  
15 *See Defenders of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005) (discussing  
16 potential harms to pygmy owls, which records suggest numbers less than 100 in  
17 area under consideration).

#### 18 DISCUSSION: INJUNCTIVE RELIEF

19 Plaintiffs move the Court pursuant to Federal Rule of Civil Procedure 65 and  
20 the ESA to prohibit Federal Defendants from authorizing snowmobiling or  
21 snowmobile trail grooming in the Caribou Recovery Area until it has adequately  
22 completed consultation with the FWS over the effects of these activities on  
23 woodland caribou. Plaintiffs submit that Defendants are violating §§ 7 and 9 of the  
24 ESA by continuing to authorize these motorized winter recreation activities  
25 without any biological opinion or incidental take statement covering them.  
26 Plaintiffs allege the continuing authorization constitutes both “jeopardy” and  
27 “take” of woodland caribou.

1 **I. Scope of Review**

2 Plaintiffs insist they are not challenging Defendants' § 7(d) determination;  
3 instead, they are basing their motion for injunctive relief on ongoing violations of  
4 the substantive provisions of §§ 7(a)(2) and 9. Because they do not challenge the  
5 USFS's determination, the Court shall not conduct a review of the determination  
6 and record pursuant to the APA. As this is a pure ESA claim, the APA's arbitrary  
7 and capricious standard of review and its limitations to the administrative record do  
8 not apply. Intervenor and Defendants argue the Court is limited to considering  
9 the administrative record in determining whether Federal Defendants are acting in  
10 violation of the ESA. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973)  
11 ("In applying [the APA], the focal point for judicial review should be the  
12 administrative record already in existence, not some new record made initially in  
13 the reviewing court."). However, in *Washington Toxics Coalition*, the Ninth  
14 Circuit found it appropriate for the district court to consider materials outside the  
15 administrative record because the ESA independently authorizes a private right of  
16 action to challenge its violations. 413 F.3d at 1029, 1034; 16 U.S.C. § 1540(g)(1).  
17 Plaintiffs' claim is under the citizen suit provision of the ESA; therefore, the Court  
18 shall consider evidence outside the administrative record.

19 **II. Sections 7 and 9 of the ESA**

20 Section 7(a)(2) of the ESA imposes a substantive duty in addition to its  
21 procedural consultation requirement discussed above. *Defenders of Wildlife v.*  
22 *EPA*, 420 F.3d at 950, 957. Federal agencies must "'insure' that [agency] actions  
23 are 'not likely to jeopardize the continued existence of any endangered species or  
24 threatened species or result in the destruction or adverse modification of [critical]  
25 habitat of such species.'" *Id.* at 950-51 (quoting 16 U.S.C. § 1536(a)(2)). Section 7  
26 therefore "includes an affirmative grant of authority to attend to protection of listed  
27 species within agencies' authority when they take actions covered by section  
28

1 7(a)(2).” *Id.* at 965. This grant of authority has been characterized as a “do-no-  
2 harm obligation” on agencies when their own actions could cause harm to an  
3 endangered species. *Id.* When consultation occurs, agencies must still operate  
4 “under the assumption that all of section 7(a)(2)’s substantive requirements apply  
5 to the action agency.” *Id.* at 966. The issuance of the § 7(d) determination in this  
6 matter qualifies as an affirmative “agency action” under § 7(a)(2). *See* 50 C.F.R. §  
7 402.02 (defining “action” to mean “all activities or programs of any kind  
8 authorized, funded, or carried out, in whole or in part, by Federal agencies”  
9 including, but not limited to “actions intended to conserve listed species or their  
10 habitat;” . . . [or] “the granting of license, contracts, leases, easements, rights-of-  
11 way, permits, or grants-in-aid”); *Defenders of Wildlife v. EPA*, 420 F.3d at 967  
12 (emphasizing that § 7(a)(2) consultation duties stem from “affirmative” actions).

13 Section 9 of the ESA makes it a crime to “take” any species listed as  
14 endangered. 16 U.S.C. § 1538(a)(1)(B). The term “take” is defined broadly to  
15 mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to  
16 attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The term “harm”  
17 as used in the ESA includes any “significant habitat modification or degradation  
18 where it actually kills or injures wildlife by significantly impairing essential  
19 behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.  
20 This definition includes “significant . . . modification or degradation” of a listed  
21 species’ habitat. *See Babbitt v. Sweet Home Chapter of Cmities. for a Great Or.*,  
22 515 U.S. 687, 691, 708 (1995) (upholding definition of “harm” in 50 C.F.R. §  
23 17.3). The term “harass” in the definition of “take” means “an intentional or  
24 negligent act or omission which creates the likelihood of injury to wildlife by  
25 annoying it to such an extent as to significantly disrupt normal behavioral patterns  
26 which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. §  
27 17.3. The anti-take provisions of § 9 apply to all actors, not just the federal  
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government. *Defenders of Wildlife v. EPA*, 420 F.3d at 975. However, § 9 does not provide coverage for endangered and threatened species that is as broad as that provided in § 7 because “the Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured.” *Sweet Home*, 515 U.S. at 703. This “after-the-fact enforcement” does not prevent threats to listed species; that task is accomplished through § 7. *Defenders of Wildlife v. EPA*, 420 F.3d at 975.

### III. Section 7(d) and Injunctive Relief Pending Completion of Consultation

As described above, the Forest Service and FWS have reinitiated consultation in accordance with § 7(a)(2) of the ESA. While consultation is ongoing, § 7(d) of the ESA provides additional guidance regarding the activities the Forest Service may permit. Section 7(d) of the ESA states:

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d). This section was “enacted to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species.” *Wash. Toxics Coalition*, 413 F.3d at 1034-35. Section 7(d) does not replace the requirements found in § 7(a)(2); rather, it “clarifies” those requirements. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 n.14 (9th Cir. 1994) (citation omitted).

In its § 7(d) determination, the Forest Service has decided to continue to allow snowmobiling and snowmobile trail grooming in most areas in which it was allowed previously, with a few exceptions. *See supra*, n.2. The Forest Service is relying on its § 7(d) determination to justify this decision. (Admin. Rec. D220). Plaintiffs assert Defendants are violating the ESA because they do not have a valid biological opinion or incidental take statement, and therefore they cannot “insure”

1 that their actions “are not likely to jeopardize” the continued existence of the  
2 woodland caribou or avoid unlawful “take” of the woodland caribou, regardless of  
3 Defendants’ issuance of and reliance upon their § 7(d) determination.  
4 Consequently, Plaintiffs request an injunction closing the entire Selkirk Caribou  
5 Recovery Area to snowmobiling and trail grooming until Defendants have  
6 developed a new lawful winter recreation plan and completed ESA consultation.  
7 Plaintiffs state the content of Forest Service’s § 7(d) determination is not  
8 necessarily relevant to their claims that Defendants are violating §§ 7 and 9 of the  
9 ESA.

10 Even though Plaintiffs are not challenging Defendants’ § 7(d) determination,  
11 the Court must consider the propriety of enjoining activities while § 7(d) is in  
12 effect, *i.e.* after the initiation but pending the completion of § 7(a)(2) consultation.  
13 In *Sierra Club v. Marsh*, the Ninth Circuit agreed with the plaintiff that an  
14 injunction was appropriate pending the reinitiation of consultation. 816 F.2d 1376,  
15 1389 (9th Cir. 1987). The court explained that “Congress intended that the  
16 consultation process would operate so as to prevent substantive violations of the  
17 act.” *Id.* The court then enjoined agency action, but limited its injunction in the  
18 following way: all work on the agency project was enjoined “unless the  
19 [defendant] reinitiates consultation within thirty days of the issuance of the  
20 mandate in this appeal, with the injunction continuing until such time as  
21 consultation is reinitiated. When consultation is reinitiated, the statutory  
22 prohibition of section 7(d) will apply.” *Id.* This wording could be read to imply  
23 that § 7(d) provides its own governing rules during the consultation process that  
24 cannot be affected by court order.

25 Since this holding, however, the Ninth Circuit has commented on its  
26 application in cases where consultation has already been initiated. In an opinion  
27 that was later withdrawn, the court stated that the *Marsh* holding “supports a  
28

1 conclusion that *non-jeopardizing* agency action may take place during the  
2 consultation process in light of the protections of Section 7(d) where the action will  
3 not result in substantive violations of the act.” *Southwest Ctr. for Biological*  
4 *Diversity v. USFS*, 307 F.3d 964, 974 (9th Cir. 2002), *vacated as moot*, 355 F.3d  
5 1203 (9th Cir. 2004) (emphasis in original).

6 Judge Canby’s dissenting opinion in that case interprets the *Marsh* language  
7 further. Judge Canby elaborates on the majority’s reference to *Marsh* and the  
8 effect of § 7(d) on pending motions for injunctive relief. He explains that “[o]ne  
9 interpretation of [the *Marsh*] language would be that section 7(a)(2) ceases to have  
10 force (at least to support an injunction) once consultation begins, and the only  
11 environmental protection thereafter must come from section 7(d).” *Id.* at 976  
12 (Canby, J. dissenting). However, Judge Canby declined to interpret *Marsh* or §  
13 7(d) that way, and explained that the majority likewise declined to do so. He stated  
14 that “[s]ection 7(d) certainly supplements section 7(a)(2) once consultation begins,  
15 but it does not, in my view, weaken the requirement of section 7(a)(2) that  
16 consultation be completed before action is taken.” *Id.* at 977 (Canby, J.  
17 dissenting). Judge Canby clarified that his point “is simply that the availability of  
18 section 7(d) is no reason to hold that an injunction to enforce section 7(a)(2) should  
19 not be kept in force until consultation is completed.” *Id.* This reasoning remains  
20 persuasive in spite of the opinion’s later withdrawal.

21 Section 7(d) also came under scrutiny in *Wash. Toxics Coalition v. EPA*, 413  
22 F.3d at 1034-35. In that case, the intervenors challenged the scope of injunctive  
23 relief requested and awarded. The Ninth Circuit stated that it is “well-settled that a  
24 court can enjoin agency action pending *completion* of section 7(a)(2)  
25 requirements.” *Id.* at 1034 (emphasis added). Finding that the “very maintenance  
26 of the ‘status quo’ . . . is alleged to be harming the endangered species[,]” the court  
27 held that an order enjoining all activities that potentially violate the ESA may be  
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1 appropriate during the consultation process. *Id.* at 1034-35. Additionally, the  
2 court held the burden of establishing that an action is non-jeopardizing pending the  
3 completion of consultation is on the agency. *Id.* at 1035. “Placing the burden on  
4 the acting agency to prove the action is non-jeopardizing is consistent with the  
5 purpose of the ESA and what we have termed its ‘institutionalized caution  
6 mandate[ ].’” *Id.* Accordingly, it is Federal Defendants’ burden to prove that  
7 continuing to permit snowmobiling within the caribou recovery area is non-  
8 jeopardizing to the species.

#### 9 **IV. Agency Action**

10 Defendants argue that § 7 does not apply to their ongoing discretion to  
11 control or limit snowmobiling and associated trail grooming within the IPNF  
12 pursuant to the original 1986 BiOp and, alternatively, that Plaintiffs’ current claims  
13 regarding the IPNF BiOp are moot. Defendants assert that consequently the Court  
14 cannot issue an injunction pursuant to § 7. In support of their position that there is  
15 no live § 7 claim, Defendants cite to a recent Ninth Circuit case, *Western*  
16 *Watersheds Project v. Matejko*, 456 F.3d 922 (9th Cir. 2006). That case involved a  
17 plaintiff’s attempt to get an agency to initiate consultation. *Id.* at 925. The court  
18 found that an agency’s failure to exercise discretion is not an “agency action” for  
19 purposes of § 7(a)(2) of the ESA, and therefore does not require consultation. *Id.*  
20 at 930. Here, the facts are readily distinguishable: Defendants have already  
21 reinitiated consultation, and they have performed an “affirmative” agency action in  
22 preparing and releasing their § 7(d) determination. Therefore, the Ninth Circuit’s  
23 holding in *Matejko* is not relevant here. Defendants’ issuance of their § 7(d)  
24 determination qualifies as an agency action under § 7(a)(2).

25 Plaintiffs in this motion submit the Forest Service is violating its ongoing  
26 substantive duties under §§ 7 and 9 of the ESA. Defendants aver this claim is not  
27 stated in Plaintiffs’ Complaint. However, Plaintiffs’ Complaint clearly includes  
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1 claims under both §§ 7 and 9 of the ESA that allege substantive violations of the  
2 Act. Furthermore, Defendants argue that Plaintiffs cannot assert a claim that  
3 simply requests the Forest Service to do more to protect caribou, stating that § 7  
4 applies only to affirmative acts. As stated above, the Court finds the issuance of  
5 the § 7(d) determination was an “affirmative” agency action, *see* 50 C.F.R. §  
6 402.02 (defining “action” under the ESA); and that Defendants continue to have an  
7 affirmative duty to “insure” that such action “is not likely to jeopardize the  
8 continued existence” of the woodland caribou. Because there was an agency  
9 action, and in accordance with Ninth Circuit case law, the Court finds it has the  
10 authority to issue an injunction after reinitiation of consultation to prohibit  
11 activities that potentially violate the ESA during the consultation process as alleged  
12 in this case. *See Wash. Toxics Coalition*, 413 F.3d at 1034-35.

### 13 **III. Merits of Plaintiffs’ Request for Injunctive Relief**

14 As described above, Plaintiffs ask the Court to prohibit Defendants’  
15 authorization of snowmobiling and trail grooming within the caribou recovery area  
16 inside the IPNF because it “jeopardizes” and “takes” the endangered woodland  
17 caribou. Section 7(d) does not authorize the Forest Service to proceed with actions  
18 that violate the ESA pending consultation—the duties and responsibilities of §§  
19 7(a)(2) and 9 continue to apply to USFS actions.

20 Therefore, the Court must determine whether Plaintiffs have made a  
21 showing that a violation of the ESA is at least likely in the future. *Burlington*  
22 *N.R.R.*, 23 F.3d at 1511. If so, the Court must enjoin the activity in light of the fact  
23 that the “balance of hardships and the public interest should tip heavily in favor of  
24 endangered species.” *Id.* at 1511 n.4 (quoting *Marsh*, 816 F.2d at 1383). When  
25 considering the possibility of a violation, evidence of past takings is instructive to  
26 the Court, particularly if there is evidence that future similar takings are likely. *Id.*  
27 at 1512. The Court also takes into account the administrative record of both the  
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1 USFS's § 7(d) determination and the FWS's 2001 IPNF Amended BiOp, along  
2 with the unchallenged declarations of Plaintiffs' experts discussing the effects of  
3 snowmobiling on woodland caribou.

4 The FWS remarks in the 2001 Amended BiOp that snowmobiling is  
5 "quickly becoming a *significant threat* to caribou, both through direct harassment  
6 and indirectly by potentially precluding caribou use of historic habitats and travel  
7 corridors." (FWS AR, at 00057) (emphasis added). According to Defendants'  
8 own administrative record, not only does snowmobiling displace caribou to less  
9 preferred habitat, but it also potentially increases predation rates by creating easier  
10 access to caribou habitat for its natural predators. (USFS AR D220, at 3-4). These  
11 effects are particularly worrisome considering the limited nutritional intake of  
12 woodland caribou in the late winter. (FWS AR, at 00018). Plaintiffs' evidence  
13 reinforces these findings. The experts both decidedly conclude that the  
14 implementation of the Forest Service's current plans will likely both "harm" and  
15 "harass" the small remaining population of woodland caribou. The study on  
16 displacement of woodland caribou from winter habitat by snowmobiles found  
17 "nearly complete displacement from an entire mountain block" that consisted of  
18 high quality habitat due to intensive snowmobile activity.

19 The Court also finds particularly instructive the direct evidence of  
20 harassment in 2004, an event admitted by Defendants at oral argument. The Forest  
21 Service employee's email shows that snowmobile activities directly affected the  
22 selection of habitat and the movement of caribou in or near the IPNF in March  
23 2004. The Court is familiar with and takes judicial notice of the territory and the  
24 amount and frequency of snowfall that occurs in and around the Idaho Panhandle  
25 National Forest. The fact that caribou have been spotted in proximity to  
26 snowmobile tracks during aerial flights is significant—it is a large territory that  
27 receives enormous and frequent amounts of snowfall. The fact that snowmobile  
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1 interaction with and harassment of these animals has been observed even once  
2 indicates to the Court that snowmobiling within the caribou recovery area presents  
3 a definitive threat of future harm to the caribou.

4 Moreover, the Service's conclusion that the IPNF Forest Plan does not  
5 "jeopardize" the continued existence of woodland caribou in its 2001 Amended  
6 BiOp is conditioned on the USFS's undertaking the reasonable and prudent  
7 measures outlined in the Incidental Take Statement. The non-discretionary duty  
8 imposed as a condition to the Incidental Take Statement is the preparation and  
9 implementation of a comprehensive recreation management strategy. The USFS  
10 has not complied with this condition. Had Plaintiffs filed a motion to enjoin  
11 snowmobiling pending the Forest Service's compliance with this condition, the  
12 Court likely would have granted that motion considering its mandatory nature and  
13 the dependence of the FWS's "no jeopardy" finding on it. Defendant's withdrawal  
14 of the Incidental Take Statement and 2001 Amended IPNF BiOp, and the Forest  
15 Service's current reliance on its unilateral § 7(d) determination, does not resolve  
16 the issues identified in those documents. From this the Court infers that the  
17 USFS's failure to comply with that mandatory condition alone jeopardizes the  
18 continued existence of the woodland caribou.

19 The evidence of past takes and the likelihood of future harms cements the  
20 Court's conclusion that Plaintiffs have made the requisite showing. The evidence,  
21 viewed in its entirety, shows that a violation of § 7(a)(2)'s substantive requirement  
22 to insure an agency action does not jeopardize the woodland caribou's survival and  
23 that a violation of § 9's prohibition against "take" in the form of harassment and  
24 harm are likely in the future. Considering the precarious finger-hold the  
25 population of woodland caribou has in this country and the ESA's institutionalized  
26 caution mandate, the Court would be remiss to permit the continuation of an  
27 activity during the consultation period that could cause any harm to the few  
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1 animals that remain within the IPNF. Accordingly, the Court grants Plaintiffs'  
2 second motion for injunctive relief.

#### 3 **IV. Scope of Relief**

4 Pursuant to Federal Rule of Civil Procedure 65(d), the Court must tailor the  
5 relief ordered. Fed. R. Civ. P. 65(d) (stating the order "shall be specific in terms;  
6 [and] shall describe in reasonable detail . . . the act or acts sought to be  
7 restrained"). Plaintiffs request an order prohibiting any and all snowmobiling and  
8 trail grooming throughout the caribou recovery area within the IPNF. Both  
9 Defendants and Intervenor pointed out at the hearing that this type of relief would  
10 be over-protective. The caribou recovery area consists of suitable caribou habitat  
11 for all seasons. Defendants and Intervenor assert an injunction, if ordered, should  
12 be limited in scope to late winter caribou habitat.

13 In the absence of more specific information, the Court chooses to be over-  
14 rather than under-protective, in accordance with the spirit of the ESA. Therefore,  
15 the Court prohibits all snowmobiling and snowmobile trail grooming within the  
16 designated caribou recovery area inside the IPNF until the completion of formal  
17 consultation. The Court recognizes that the parties are more knowledgeable about  
18 the snowmobiling areas and groomed trails that exist within the caribou recovery  
19 area in the IPNF than is the Court. The parties also are more familiar with the  
20 locations of suitable habitat that could be impacted by these activities. Therefore,  
21 if the parties disagree with the scope of the present injunction, the Court invites  
22 them to submit briefing on its proper scope.

#### 23 **JURISDICTION & STANDARD OF REVIEW: SUMMARY JUDGMENT**

24 Citizens and citizen groups are authorized under the ESA to file suit "to  
25 enjoin any person, including the United States . . . who is alleged to be in violation  
26 of any provision of this chapter or regulations issued under the authority thereof."  
27 16 U.S.C. § 1540(g)(1). Federal district courts have jurisdiction to enforce "any  
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1 such provision or regulation.” *Id.*

2 Partial summary judgment is appropriate if the “pleadings, depositions,  
3 answers to interrogatories, and admissions on file, together with the affidavits, if  
4 any, show that there is no genuine issue as to any material fact and that the moving  
5 party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). When  
6 considering a motion for summary judgment, a court may neither weigh the  
7 evidence nor assess credibility; instead, “the evidence of the non-movant is to be  
8 believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v.*  
9 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

10 Agency decisions under the ESA are governed by the APA, which requires  
11 an agency action to be upheld unless it is found to be “arbitrary, capricious, an  
12 abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §  
13 706(2)(A); *Pacific Coast Fed’n of Fishermen’s Ass’n v. NMFS*, 265 F.3d 1028,  
14 1034 (9th Cir. 2001) (“*PCFFA*”). The biological opinion at issue here, including  
15 the Incidental Take statement, and the CCSA, are final agency actions subject to  
16 this standard. *PCFFA*, 265 F.3d at 1033-34 (biological opinions and  
17 accompanying incidental take statements are “final agency actions); Ct. Rec. 65, at  
18 16 (finding the CCSA is an “agency action” requiring consultation under the  
19 ESA’s § 7(a)(2)). Under the arbitrary and capricious standard, the Court must ask  
20 “whether the agency considered the relevant factors and articulated a rational  
21 connection between the facts found and the choice made.” *PCFFA*, 265 F.3d at  
22 1034 (internal quotation marks and citation omitted).

#### 23 **DISCUSSION: MOTIONS FOR SUMMARY JUDGMENT**

24 Before the Court are Plaintiffs’ Motion for Partial Summary Judgment (Ct.  
25 Rec. 36) and Defendants’ Cross-Motion for Partial Summary Judgment (Ct. Rec.  
26 78). As outlined above, both Plaintiffs’ and Defendants’ motions focus on the  
27 same four issues:

28 **ORDER DENYING PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY  
JUDGMENT, GRANTING DEFENDANTS’ CROSS-MOTION AND  
PLAINTIFFS’ MOTION FOR INJUNCTIVE RELIEF \* 21**

(1) The amended [IPNF BiOp] issued by defendants Susan Martin and U.S. Fish and Wildlife Service is arbitrary, capricious, an abuse of discretion, and/or contrary to law, pursuant to the ESA and the Administrative Procedure Act (“APA”);

(2) The Incidental Take Statement within the IPNF BiOp is arbitrary, capricious, an abuse of discretion, and/or contrary to law, pursuant to the ESA and the APA;

(3) Defendants have further violated the ESA by not reinitiating consultation over the IPNF BiOp, after the U.S. Forest Service failed to comply with the non-discretionary Terms and Conditions within the Incidental Take Statement; and/or

(4) Defendants McNair and U.S. Forest Service have violated the ESA by failing to consult with U.S. Fish and Wildlife Service over their [CCSA] for snowmobile trail grooming on the IPNF, and by failing to ensure that the [CCSA] will not jeopardize the continued existence of the woodland caribou.

(Ct. Rec. 36, Pls.’ Mot. Partial Summ. J., at 3). Plaintiffs limit their request to the Idaho Panhandle National Forest (“IPNF”). They explain that even though the Complaint alleges similar challenges to the biological opinion for the Colville National Forest, Plaintiffs are presenting their challenges over the IPNF first in the interest of judicial economy.

Defendants raise a threshold question in their cross-motion. They submit that, since Plaintiffs filed their motion for partial summary judgment, IPNF has reinitiated formal consultation with the Fish and Wildlife Service and withdrawn those portions of the 2001 Amended BiOp that relate to woodland caribou and winter recreation in the IPNF. While consultation is pending, Federal Defendants maintain they will be implementing limitations in accordance with § 7(d) of the ESA. These actions, according to Defendants, moot Plaintiffs’ claims for summary judgment. Plaintiffs respond that the case is not moot and they are entitled to declaratory relief to establish that Defendants violated the ESA and to prevent further violations. Defendants concur that the *case* is not moot; instead, they assert that the *claims* raised in Plaintiffs’ motion for partial summary judgment are moot by virtue of the reinitiation of consultation.

#### **I. Section 7(a)(2) of the ESA**

To determine whether Plaintiffs’ claims in their motion for partial summary

1 judgment are moot, some background discussion regarding the workings of the  
2 ESA is appropriate. Section 7(a)(2) of the ESA provides: “Each Federal agency  
3 shall, in consultation with and with the assistance of the Secretary, insure that any  
4 action authorized, funded, or carried out by such agency . . . is not likely to  
5 jeopardize the continued existence of any endangered species or threatened species  
6 . . . .” 16 U.S.C. § 1536(a)(2). “Jeopardize” means to “reduce appreciably the  
7 likelihood of both the survival and recovery of a listed species in the wild by  
8 reducing the reproduction, numbers, or distribution of that species.” 40 C.F.R. §  
9 402.02. This section therefore ensures the agency meets its substantive ESA duties  
10 by imposing a procedural consultation duty whenever a federal action may affect a  
11 listed species. *Nat’l Wildlife Fed’n v. NMFS*, 422 F.3d 782, 790 (9th Cir. 2005).

12 During the consultation process, the agency “evaluates the effects of the  
13 proposed action on the survival of [the] species and any potential destruction or  
14 adverse modification of critical habitat in a biological opinion, 16 U.S.C. §  
15 1536(b), based on ‘the best scientific and commercial data available,’ *id.* at §  
16 1536(a)(2).” *Nat’l Wildlife Fed’n*, 422 F.3d at 790. The biological opinion must  
17 include (1) a summary of the information upon which the information is based; (2)  
18 a discussion of the effects of the action on listed species or critical habitat; and (3)  
19 the agency’s opinion on “whether the action is likely to jeopardize the continued  
20 existence of a listed species or result in the destruction or adverse modification of  
21 critical habitat . . . .” 50 C.F.R. § 402.14(h). If the biological opinion concludes  
22 that jeopardy is not likely and there will not be adverse modification of critical  
23 habitat, or if it concludes that there is a “reasonable and prudent alternative” to the  
24 agency action that avoids jeopardy and adverse modification and that the incidental  
25 taking of endangered or threatened species will not violate § 7(a)(2), the consulting  
26 agency, here FWS, can issue an “Incidental Take Statement” which, if followed,  
27 exempts the action agency, here USFS, from the prohibition on takings in § 9 of  
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1 the ESA. *Nat'l Wildlife Fed'n*, 422 F.3d at 790. The 2001 IPNF Amended BiOp  
 2 and its Incidental Take Statement were the results of this process and form the  
 3 basis of Plaintiffs' motion for partial summary judgment.

## 4 **II. Mootness**

5 Article III limits federal courts' jurisdiction to "cases or controversies." *Doe*  
 6 *v. Madison School Dist. No. 321*, 177 F.3d 789, 797 (9th Cir. 1999). A plaintiff  
 7 must therefore maintain a live case throughout litigation to preserve federal  
 8 jurisdiction. *Id.* "Federal courts lack jurisdiction to consider 'moot questions . . .  
 9 or to declare principles or rules of law which cannot affect the matter in issue in the  
 10 case before it.'" *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)  
 11 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).  
 12 Put simply, a court cannot "take jurisdiction over a claim to which no effective  
 13 relief can be granted." *Headwaters, Inc. v. BLM*, 893 F.2d 1012, 1015 (9th Cir.  
 14 1990). The party asserting mootness, here the Federal Defendants, bears the  
 15 burden of establishing that there is no effective relief the Court can provide. This  
 16 burden is a heavy one: "a case is not moot where *any* effective relief may be  
 17 granted." *Forest Guardians*, 450 F.3d at 461 (emphasis in original).

18 Defendants assert Plaintiffs' claims are moot because they are based on the  
 19 2001 Amended BiOp. That opinion was withdrawn once the IPNF and the Service  
 20 reinitiated consultation. Defendants rely heavily on a Tenth Circuit case for the  
 21 proposition that Plaintiffs' claims are mooted by the reinitiation of consultation. In  
 22 *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727-29 (10th Cir.  
 23 1997) ("*SUWA*"), the Tenth Circuit dismissed claims for injunctive and declaratory  
 24 relief, finding that the reinitiation of consultation rendered them moot. There, the  
 25 plaintiff alleged that the Bureau of Land Management ("BLM") violated § 7 of the  
 26 ESA by failing to consult with the FWS over a management plan for BLM land  
 27 that was home to a listed species of plant life. *Id.* at 725. The management plan in  
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1 that case, similar to the forest plan here, required BLM to close certain access  
 2 routes used by off-road vehicles but to leave open several others. *Id.* at 726. The  
 3 plaintiff requested injunctive and declaratory relief, particularly in the form of a  
 4 stay of the management plan pending consultation regarding the impact of off-road  
 5 vehicle use on the listed plant on the open access routes. *Id.* The BLM initiated  
 6 and completed consultation while the action was pending, and the district court  
 7 ruled against the plaintiff on the merits and found the action mooted. *Id.* at 727.  
 8 The Tenth Circuit affirmed. *Id.* at 729-30.

9 The Ninth Circuit has pointed out that the Tenth Circuit's holding in *SUWA*  
 10 is limited, however. In *Forest Guardians*, the Ninth Circuit distinguished the facts  
 11 in *SUWA*, noting how the Tenth Circuit "expressly narrowed its holding:"

12 "This is not to say that a violation of section 7(a)(2) could always be  
 13 cured by subsequent consultation, nor is this general approval for  
 14 consultation after the fact. Instead, this merely recognizes that the  
 15 changed circumstances of this particular case no longer present an  
 16 opportunity for meaningful relief. . . . A declaratory judgment would  
 17 serve no purpose in this case. This case does not involve a continuing  
 18 violation or practice, and *SUWA* has not shown that the defendants  
 19 are likely to violate section 7(a)(2) in the near future. A declaratory  
 20 judgment would not affect the matter, and would be in the nature of an  
 21 advisory opinion."

22 450 F.3d at 462 (quoting *SUWA*, 110 F.3d at 729-30). The Ninth Circuit held that  
 23 the reasoning presented in *SUWA* would not apply to cases in which there is a  
 24 continuing practice and/or to cases in which the practice of not complying with  
 25 requirements<sup>3</sup> is likely to persist despite re-consultation. *Id.* The court explained  
 26 that where "both injunctive and declaratory relief are sought but the request for an  
 27 injunction is rendered moot during litigation, if a declaratory judgment would  
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24 <sup>3</sup> In *Forest Guardians*, the Forest Service was required under a land  
 25 management plan to monitor the utilization levels of several grazed pastures in an  
 26 allotment on a yearly basis to maintain the FWS's "not likely to adversely affect"  
 27 finding. 450 F.3d at 458-59.

1 nevertheless provide effective relief the action is not moot.” *Id.*

2 Here, as in *Forest Guardians*, Plaintiffs allege Federal Defendants have not  
3 complied with requirements set forth in the Incidental Take Statement. Federal  
4 Defendants have not developed or implemented a Recreation Strategy, which was a  
5 mandatory condition to maintaining the FWS’s no jeopardy finding. Unlike *Forest*  
6 *Guardians*, however, the Federal Defendants here are not arguing that the  
7 condition they failed to satisfy is “unreasonable,” nor are they arguing that they are  
8 not required to develop and implement a strategy. To the contrary, the Federal  
9 Defendants assert they are currently developing a strategy in consultation with the  
10 FWS. Therefore, Defendants submit there is no continuing practice and non-  
11 compliance is not likely to persist.

12 As mentioned above, Plaintiffs request four areas of relief in their motion for  
13 partial summary judgment. Plaintiffs’ first two claims ask the Court to find the  
14 2001 IPNF Amended BiOp and its Incidental Take Statement are arbitrary,  
15 capricious, an abuse of discretion, and/or contrary to law. Plaintiffs’ third claim in  
16 their motion for partial summary judgment specifically calls for reinitiation of  
17 consultation. Lastly, Plaintiffs claim Defendants violated the ESA by failing to  
18 consult with the Fish and Wildlife Service over the CCSA and by failing to ensure  
19 the CCSA will not jeopardize the continued existence of the woodland caribou.

20 Clearly Plaintiffs’ third claim regarding reinitiation of consultation is now  
21 moot. Defendants have reinitiated consultation. Plaintiffs’ last claim also requests  
22 consultation. Plaintiffs ask the Court to order Defendants to consult over the  
23 CCSA, and they assert that through this process of consultation Defendants will  
24 ensure the CCSA will not jeopardize the continued existence of woodland caribou.  
25 These two claims are now moot because there is no effective relief that can be  
26 granted—Defendants are already engaged in consultation.

27 However, Plaintiffs’ first two claims for relief depend entirely on the status  
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1 of the 2001 IPNF Amended BiOp. If the BiOp is withdrawn and completely  
2 inapplicable, Plaintiffs' first two claims for partial summary judgment are likewise  
3 moot. Conversely, if the BiOp remains even partially in force, the Court may be  
4 able to fashion some form of effective relief.

5 Defendants assert that, with the reinitiation of consultation, the 2001 IPNF  
6 Amended BiOp is withdrawn and no longer considered valid. Plaintiffs in their  
7 response allege two defenses to Defendants' "withdrawal" of the IPNF BiOp: (1)  
8 Defendants are still in violation of the ESA by relying on a biological opinion  
9 almost identical to the IPNF BiOp for the Colville National Forest; and (2)  
10 Defendants are continuing to authorize snowmobile activities in spite of the  
11 withdrawal of the 2001 Amended BiOp. Plaintiffs' first argument relating to the  
12 Colville BiOp is not before the Court at this time. Plaintiffs expressly limited their  
13 motion for partial summary judgment to the IPNF and stated in their motion that  
14 they would address their claims related to the Colville National Forest separately.

15 However, Plaintiffs' second argument and some case law does support a  
16 finding that the 2001 BiOp should still be considered. Several district courts have  
17 found that a biological opinion, upon reinitiation of consultation, remains  
18 justiciable when there is a possibility of continuing violations and/or the plaintiffs  
19 are challenging the process behind the biological opinion. *See Greenpeace v. Nat'l*  
20 *Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1152 (W.D. Wash. 2000) (finding  
21 that "until such time as a comprehensive opinion is in place, this Court retains the  
22 authority to determine whether any continuing action violates the ESA and can  
23 provide effective relief by enjoining it or remedying its effects"); *Greenpeace*  
24 *Found. v. Mineta*, 122 F. Supp. 2d 1123, 1128 (D. Haw. 2000) (holding "so long as  
25 the current biological opinions governing the Crustacean FMP stand in place, a  
26 challenge to the adequacy of those opinions is justiciable" because the plaintiffs  
27 challenged the adequacy of prior consultation). These opinions seem to address  
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1 whether an entire case is moot, however, not whether certain claims related to the  
2 withdrawn biological opinions are moot.

3 Other district courts have reached the contrary conclusion and found that a  
4 withdrawn biological opinion does render claims moot, particularly after  
5 considering the effect of § 7(d) and/or the doctrine of prudential mootness. *See*  
6 *Southwest Center for Biological Diversity v. USFS* (“SCBD”), 82 F. Supp. 2d  
7 1070, 1078-80 (D. Ariz. 2000) (finding the plaintiffs’ § 7(a)(2) claims were moot  
8 and that the action centered now around the defendants’ compliance with § 7(d));  
9 *Or. Natural Res. Council v. Keys*, 2004 WL 1048168, at \*10 (D. Or. 2004)  
10 (applying prudential mootness to dismiss).

11 As in *SCBD*, Plaintiffs here essentially are asking the Court to issue a  
12 declaratory judgment stating that Federal Defendants’ 2001 IPNF Amended BiOp  
13 was in violation of § 7(a)(2) of the ESA prior to the reinitiation of consultation.  
14 Because of the limited nature of Plaintiffs’ claims and requests for relief in their  
15 motion for partial summary judgment and the application of § 7(d) to the Forest  
16 Service’s future actions within the IPNF, the declaratory relief requested would no  
17 longer affect the matter in issue in this case. The Court finds Plaintiffs’ motion is  
18 moot and elects not to issue an advisory opinion.<sup>4</sup>

19 Plaintiffs put forth two other arguments as to the continuing viability of their  
20 motion. They argue the Court should not dismiss on the basis of mootness because  
21 Defendants voluntarily ceased their illegal activities, and they assert the Court may  
22 still grant relief in the form of a declaratory judgment.

23 “It is well settled that a defendant’s voluntary cessation of a challenged  
24 practice does not deprive a federal court of its power to determine the legality of  
25 the practice . . . . [I]f it did, the courts would be compelled to leave [t]he defendant

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26  
27 <sup>4</sup> Because it has found Plaintiffs’ claims are moot, the Court declines to  
28 address Defendants’ alternative theory for dismissal based on prudential mootness.

1 . . . free to return to his old ways.” *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S.  
2 167, 189 (2000) (internal quotations and citations omitted). “[A] defendant  
3 claiming that its voluntary compliance moots a case bears the formidable burden of  
4 showing that it is absolutely clear the allegedly wrongful behavior could not  
5 reasonably be expected to recur.” *Id.* at 190. It is clear here that Federal  
6 Defendants do not intend to rely on the challenged 2001 BiOp after publicly  
7 announcing that it is no longer valid. *See Forest Guardians v. USFS*, 329 F.3d  
8 1089, 1095 (9th Cir. 2003). Therefore, the Court may reasonably conclude that it  
9 is “absolutely clear” the Federal Defendants will not in the future rely on the 2001  
10 IPNF Amended BiOp. The voluntary cessation exception to the mootness  
11 jurisdictional bar does not apply here. *See id.*

12 As to Plaintiffs’ declaratory relief argument, many cases cited *supra* support  
13 the conclusion that the Court must consider requests for declaratory relief separate  
14 from the availability of injunctive relief. *E.g., Forest Guardians v. Johanns*, 450  
15 F.3d at 462. However, “[d]eclaratory relief claims are not immune from mootness  
16 considerations.” *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1195 (9th  
17 Cir. 2000). Plaintiffs state they seek a declaratory judgment to ensure that the  
18 USFS does not continue to violate the ESA by jeopardizing caribou in its ongoing  
19 authorization of snowmobiling and to ensure that the new biological opinion does  
20 not have the same flaws as the 2001 IPNF Amended BiOp. However, issuing a  
21 declaratory judgment about the adequacy of a withdrawn biological opinion would  
22 have no such effect and would be in the nature of an advisory opinion. Plaintiffs  
23 framed their motion for partial summary judgment narrowly, and the future  
24 implementation of policies against which they seek a declaration have no relation  
25 to the withdrawn 2001 IPNF Amended BiOp. *See Headwaters, Inc.*, 893 F.2d at  
26 1015.

27 Although there are certainly many issues and claims remaining in this case  
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1 and much potential for relief, Defendants' reinitiation of consultation has rendered  
2 the claims set forth in Plaintiffs' motion for partial summary judgment moot.  
3 There is no effective relief the Court can grant regarding these claims, so the Court  
4 denies Plaintiffs' motion and grants Defendants' cross-motion for partial summary  
5 judgment. The Court does not revoke its prior Order granting Plaintiffs' motion  
6 for a preliminary injunction, however, because that order by its own terms extends  
7 until the *completion* of § 7(a)(2) consultation.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Plaintiffs' Motion for Partial Summary Judgment (Ct. Rec. 36) is  
10 **DENIED.**

11 2. Defendants' Cross-Motion for Partial Summary Judgment (Ct. Rec. 78) is  
12 **GRANTED.**

13 3. Plaintiffs' Second Motion for Injunctive Relief (Ct. Rec. 105) is  
14 **GRANTED.**

15 4. Defendants are **ENJOINED** from authorizing snowmobiling and  
16 snowmobile trail grooming in the designated caribou recovery area within the  
17 IPNF until they have adequately completed consultation over the effects of these  
18 activities on woodland caribou.

19 5. The parties shall in good faith confer regarding the scope of this  
20 injunction and, if necessary, submit a proposed order that narrows its scope. If the  
21 parties cannot agree on the scope of the injunction, they shall submit separate  
22 proposed orders accompanied by memoranda. The parties shall file these  
23 documents with the Court on or before **ten (10) days** after the entry of this Order.

24 6. A hearing is **set for October 6, 2006, at 8:00 a.m.** The parties shall  
25 present and, if necessary, argue for the application of their proposed order(s) for  
26 injunctive relief at that time. The parties may appear telephonically by calling the  
27 Court's conference line ((509) 458-6380) at the scheduled time.

28 **ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT, GRANTING DEFENDANTS' CROSS-MOTION AND  
PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF \* 30**

1       **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
2 enter this Order and furnish copies to counsel.

3       **DATED** this 22<sup>nd</sup> day of September, 2006.

4                               *s/ Robert H. Whaley*

5                               **ROBERT H. WHALEY**  
6                               Chief United States District Judge

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